Supreme Court, U.S.
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NO. 94 868

IN THE

Supreme Court of the United States

OCTOBER TERM 1994

GARY LYNN WALLACE,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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69pp

QUESTION PRESENTED

Was the Petitioner deprived of his right to counsel of choice under the Sixth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

Gary Lynn Wallace, Petitioner

United States of America, Respondent

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STATEMENT OF JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked pursuant to the provisions of 28 U.S.C. § 1254(1). Review is sought of the unpublished opinion of the United States Court of Appeals for the Fourth Circuit in United States of America v. Gary Lynn Wallace, No. 93-5760, decided on June 23, 1994.

CONSTITUTIONAL PROVISION INVOLVED
SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

The Petitioner, along with co-defendant Thurman Dortch, was charged in an eight-count indictment filed on November 30, 1992. (App. 6-14) The Petitioner was charged in count one with conspiracy to misapply bank funds in violation of 18 U.S.C. § 656, and in counts two through seven with misapplication, or aiding and abetting in the misapplication, of bank funds, also in violation of 18 U.S.C. § 656.

The Petitioner entered a plea of not guilty to each of the counts in the indictment at his arraignment on December 7, 1992. (App. 2) The Petitioner appeared for jury trial on February 17, 1993. (App. 3) The trial began on February 18, 1993, and concluded on February 23, 1993, with the jury

returning verdicts of guilty on each count. (App. 3)

The Petitioner appeared for sentencing on July 26, 1993, at which time the Court imposed a sentence of a term of imprisonment of 53 months (concurrent on all counts) and restitution in the amount of $1.7 million dollars, jointly and severally with co-defendant Dortch. (App. 4) A Judgment incorporating that sentence was filed on September 14, 1993. (App. 60-64) An Amended Judgment was filed on September 27, 1993. (App. 67-71)

The Petitioner filed Notice of Appeal to the Fourth Circuit Court of Appeals on September 15, 1993. (App. 65-66) Jurisdiction in the United States District Court for the Middle District of North Carolina of this federal criminal

case was based on 28 U.S.C. § 1331. Jurisdiction in the United States Court of Appeals for the Fourth Circuit of the appeal from that conviction was based on 28 U.S.C. § 1291.

On appeal, the Petitioner presented the issue of whether he was unconstitutionally denied his right to counsel of his own choosing in violation of the Sixth Amendment to the United States Constitution. The Court of Appeals, in its Opinion dated June 23, 1994, affirmed the Petitioner's conviction and sentence.

Thereafter, the Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc in the Court of Appeals pursuant to Rules 35 and 40, Federal Rules of Appellate Procedure. That petition was denied by order of the

Fourth Circuit Court of Appeals filed on July 19, 1994. That order was received by Petitioner's counsel on July 25, 1994. Petitioner filed a motion in the United States Supreme Court requesting an extension of time to and including October 24, 1994 within which to file his petition for writ of certiorari.

This Petition for Writ of Certiorari is presented specifically requesting review of the decision of the Court of Appeals for the Fourth Circuit affirming Petitioner's conviction for criminal offenses on which the Petitioner was forced to proceed to trial without his counsel of choice to which he was entitled under the Sixth Amendment.

STATEMENT OF THE FACTS

The Petitioner is a real estate developer who has been in that business in the Durham, North Carolina area for a number of years. Co-defendant Thurman Dortch was Chief City Executive of NationsBank in Durham, North Carolina. In early 1992, the Petitioner was approached by an FBI agent and bank officials concerning potential charges in this case. The Petitioner at that time sought legal counsel, and was referred to the undersigned Jack W. Floyd. After discussing the matter with Mr. Floyd, the Petitioner retained the services of Mr. Floyd to represent him in this matter. Mr. Floyd was admitted to the bar in 1961, and has over thirty years of trial experience in civil and criminal cases in both the state and federal courts. Mr.

Floyd requested that William C. Ingram, one of his partners, who was admitted to the bar in 1981, assist him in representing Petitioner. From the outset it was the intention of the Petitioner, and the understanding of Mr. Floyd and Mr. Ingram, that Mr. Floyd would serve as primary lead counsel throughout the trial of this criminal case, to be assisted by Mr. Ingram.

An indictment was returned against Petitioner and co-defendant Dortch on November 30, 1992. (App. 2, 6) The Petitioner appeared with Mr. Ingram on December 2, 1992, for the setting of his conditions of pretrial release, which was not opposed by the government. At that hearing, Mr. Ingram stated to the court for the record that both he and Mr. Floyd, as lead counsel, would be

representing the Petitioner. (App. 2) On December 7, 1992, the Petitioner appeared with Mr. Ingram for arraignment. (App. 2) Again, Mr. Ingram stated for the record that Mr. Floyd was lead counsel and that he would be assisting Mr. Floyd. At arraignment, the trial for the Petitioner tentatively was scheduled for January 11, 1993. (App. 2)

On February 3, 1993, the Petitioner, through Mr. Floyd and Mr. Ingram, filed a motion to continue the trial past the February 1993 term based on trial conflicts of counsel and the need for additional preparation time because of the complexity of the case. The government filed a response to that motion, in which the government indicated that the two co-defendants would be tried separately, with co-defendant Dortch to

be tried first on February 16, 1993, and the Petitioner's trial to begin later in the February term. (App. 2)

On February 9, 1993, a hearing was conducted before the Honorable Frank W. Bullock, Jr., on the motion to continue and other pending motions. Mr. Ingram appeared with the Petitioner. At the outset, the United States Attorney stated unequivocally that the government would proceed first with the trial of co-defendant Dortch during the week of February 16, 1993, with the trial of the Petitioner to begin later in the term. (App. 17-18) The United States Attorney also stated that his office would attempt to find another, unrelated case to try immediately after the Dortch trial so that the Dortch and Wallace trials would not be back-to-back. (App. 18)

Judge Bullock at the hearing indicated his understanding that the trial of co-defendant Dortch would be the first of these two cases for trial. (App. 32) At that point, Mr. Ingram stated that, based upon the schedule discussed in court thus far, the motion to continue on behalf of the Petitioner largely had been mooted. (App. 32-33)

The judge then set out the following trial schedule for the February 1993 term of criminal court. The Dortch trial, a 4-day trial, would proceed on February 16, 1993. (App. 33) The trial of the Petitioner might then begin during the week of February 22, 1993. However, the judge later in the hearing informed the parties that he had a judges' meeting to attend on February 25 and 26, 1993. (App. 45) The United States Attorney

then stated that the week of February 22, 1993, for the Petitioner's trial therefore was an impossibility, based on the lack of availability of Judge Bullock on February 25 and 26, since the Petitioner's trial could not be completed in the first three days of that week. (App. 46) Therefore, at this point in the hearing, statements by the prosecutor and the trial judge explicitly conveyed the fact that the Petitioner's trial would not be called at any time during February 1993.

During the hearing, Judge Bullock also stated that he previously had set an unrelated multi-defendant trial for March 1, 1993, which would last a week or more. (App. 33) The judge also noted that he had another matter not involving the February criminal calendar scheduled for

the week of March 15, 1993, and therefore the Petitioner's trial could not be tried during that week. (App. 33) Based on all of the above statements concerning scheduling, the parties left the hearing on February 9, 1993, with the unmistakable understanding that the Dortch trial would proceed on February 16, 1993, and the Petitioner's trial would not be reached until sometime during the latter part of March, 1993.

Based on those representations made by the United States Attorney and Judge Bullock at the motion hearing on February 9, 1993, as set forth above, Mr. Floyd began a civil jury trial in state court on Monday, February 15, 1993, which lasted one full week. (App. 52-53, 58) On the morning of February 17, 1993, while Mr. Floyd was in his state court

trial, Mr. Ingram received a telephone call from the clerk of federal court indicating that the Petitioner should be in court at 2:00 p.m. that day. Mr. Ingram appeared with the Petitioner at 2:00 p.m. on February 17, 1993. Co-defendant Dortch also appeared with his attorney at that same time. Counsel for co-defendant Dortch was requesting a continuance of his trial because he was completing another unrelated jury trial on that day before Judge Bullock.

In response to Dortch's request for a continuance, Judge Bullock stated for the first time that either the Petitioner's trial or the Dortch trial would begin on that afternoon of February 17, 1993. Mr. Ingram informed the court of the trial conflict of Mr. Floyd, indicating that Mr. Floyd would be

unavailable until at least Monday, February 22, 1993, because of that conflict. (App. 58) Despite the unavailability of Mr. Floyd, Judge Bullock ordered that the trial of the Petitioner would begin with jury selection that same afternoon, with the trial to begin on the following morning, February 18, 1993, with Mr. Ingram proceeding as sole counsel for the Petitioner. (App. 55-59) The trial of the Petitioner, based on Judge Bullock's ruling, began on the following morning, with Mr. Ingram as sole counsel for Petitioner because of the trial conflict of Mr. Floyd. (App. 3)

On the morning of February 18, 1993, as the jury was entering the courtroom, Mr. Ingram attempted to state for the record the position of the Petitioner

concerning the unavailability of Mr. Floyd. Mr. Ingram stated as follows:

> I simply wanted to state for the record that when we had our motion hearing last week, the clear impression that I got from the schedule that Mr. Hobgood announced was that Mr. Dortch's trial would be first, regardless of when it started. There was no suggestion in that hearing that Mr. Wallace's trial would precede Mr. Dortch's trial. (App. 56)
>
> . . . you know, if we had been told, yes, you must be here on the 16th, then Mr. Floyd would have continued his superior court trial this week and would have been available. It was only last week when we got the clear impression that the Dortch trial would go first and that this trial would be sometime later in the month that Mr. Floyd committed to the superior court judge to go ahead and begin his civil case. And because he is in trial and will be for the rest of the week, he cannot be here. (App. 58)

Despite the unavailability of Mr. Floyd solely due to the misleading

previously announced schedule for the trials of Dortch and the Petitioner, the judge insisted that the Petitioner's trial begin without Mr. Floyd. (App. 58)

REASONS FOR GRANTING THE WRIT

Rule 10.1(a) of the Rules of the United States Supreme Court provides that the Supreme Court may issue a writ of certiorari on the following basis:

> When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

The United States Court of Appeals for the Fourth Circuit, in its Opinion in this case, failed to address a significant conflict among the federal courts of appeals on an important issue of law directly relating to a criminal defendant's Sixth Amendment right to

counsel of his own choosing. Cases cited by the Petitioner in the Argument section below stand for the proposition that a criminal defendant presenting the issue of the denial of his Sixth Amendment right to counsel of choice need not demonstrate prejudice resulting from such denial. Those cases hold that the Sixth Amendment right to counsel of choice is too important to require a showing of prejudice by the defendant when that right is denied, and, therefore, prejudice is to be presumed from the denial of that constitutional right. There are other appellate cases, cited below, which imply that a trial judge in his discretion may rely upon, among other factors, a lack of prejudice to a criminal defendant in requiring that

defendant to proceed to trial without his counsel of choice.

The opinion of the Fourth Circuit Court of Appeals in this case did not address this issue or the conflict among the circuits, but did cite the lack of prejudice to this Petitioner as a reason justifying the trial judge's exercise of discretion in requiring the Petitioner to proceed to trial without his counsel of choice. The United States Supreme Court should exercise its discretion in granting this petition for writ of certiorari because of this conflict among the federal courts of appeals. More precisely, that conflict of law among the circuits allows a trial judge in the mere exercise of discretion to diminish the significant constitutional right to counsel of choice under the Sixth

Amendment, rendering that right a mere formality. Rule 10.1(a), as set forth above, specifically provides a basis for the discretionary review by the United States Supreme Court of such an important constitutional issue when a conflict among the federal circuits exists, and this Court should grant this petition for writ of certiorari on that basis.

ARGUMENT

I. WAS THE PETITIONER DEPRIVED OF HIS RIGHT TO COUNSEL OF CHOICE UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Petitioner presents the issue of whether he was unconstitutionally denied his right to counsel of his own choosing at his criminal trial pursuant to the Sixth Amendment to the United States Constitution. In both his brief below and in this petition, the Petitioner cites case law from various courts of appeal for the proposition that, when a criminal defendant is denied his constitutional right to counsel of his own choosing, that defendant need not demonstrate prejudice resulting from the denial of that right. The Fourth Circuit, in affirming the Petitioner's

criminal conviction, relied in large part on its assertion that the attorney who actually represented the Petitioner at his trial, Mr. Ingram, was competent and adequately prepared for the trial. There is conflict among the federal courts of appeal as to whether or not a defendant asserting the denial of his right to counsel of choice must demonstrate prejudice resulting from that denial. It is this conflict among the circuits on this important constitutional issue which the Petitioner asserts as a ground for the granting of his petition for writ of certiorari. As additional bases for the granting of this petition, the Petitioner cites to this Court the apparent disregard of the Sixth Amendment right to counsel of choice by the trial judge, and the misunderstanding of the Fourth

Circuit Court of Appeals as to the law and the context in which the trial judge denied that important constitutional right to this Petitioner.

The United States Supreme Court has recognized that the Sixth Amendment to the United States Constitution provides to a criminal defendant the right not merely to some counsel, but, more specifically, to counsel of one's choice. Wheat v. United States, 486 U.S. 153, 164 (1988); Johnston v. Zerbst, 304 U.S. 458, 463 (1938); Powell v. Alabama, 287 U.S. 45, 53 (1932). The Sixth Circuit has characterized the right to choose one's own counsel as an "essential component" of the Sixth Amendment. Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981). Also, in recognition of the importance of a defendant's right to

counsel of his own choosing, the Fourth Circuit has stated as follows:

> Indeed it is plain upon consideration of the way in which the contours of the Sixth Amendment's total guarantee have evolved that the right to be represented by privately retained counsel is the primary, preferred component of the basic right to some counsel.

United States v. Harvey, 814 F.2d 905, 923 (4th Cir. 1987).

Courts universally have recognized that the most important decision a defendant in a criminal case makes in shaping his defense is his selection of an attorney. United States v. Laura, 607 F.2d 52 (3rd Cir. 1979); United States v. Inman, 483 F.2d 738 (4th Cir. 1973). The Third Circuit has stated:

> [a]ttorneys are not fungible . . . [and] may differ as to their trial strategy, their oratory style, or the importance they give to

> particular legal issues. These differences, all within the range of effective and competent advocacy, may be important in the development of a defense . . . . Given this reality, a defendant's decision to select a particular attorney becomes critical to the type of defense he will make and thus falls within the ambit of the Sixth Amendment.

United States v. Romano, 849 F.2d 812, 819 (3rd Cir. 1988).

A defendant's right to counsel of choice under the Sixth Amendment is unconstitutionally denied when he is forced to proceed to trial with counsel who is not the chosen counsel of that defendant. Sampley v. Attorney General, 786 F.2d 610 (4th Cir. 1986); United States v. Fisher, 477 F.2d 300 (4th Cir. 1973).

The Petitioner argued to the Fourth Circuit, and argues to this Court, that, in determining whether the Sixth

Amendment right to counsel of choice has been violated, a defendant need not demonstrate that he was prejudiced by such a denial, or that counsel by whom he actually was represented at trial was incompetent. Bland v. California Department of Corrections, 20 F.3d 1469 (9th Cir. 1994); United States v. Rankin, 779 F.2d 956 (3rd Cir. 1986); United States v. Harvey, 814 F.2d 905 (4th Cir. 1987); Wilson v. Mintzes, 761 F.2d 275 (6th Cir. 1985); Linton v. Perini, 656 F.2d 207 (6th Cir. 1981); United States v. Burton, 584 F.2d 485, 491, fn. 19 (D.C. Cir. 1978). "Obtaining reversal for violation of such a right does not require showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of

concern for the objective fairness of the proceeding." Flanagan v. United States, 465 U.S. 259, 268 (1984).

Nevertheless, the decision of the Fourth Circuit is based in large part on the proposition that the attorney representing the Petitioner at trial, Mr. Ingram, was competent and adequately prepared, and therefore the Petitioner was not prejudiced by the absence of Mr. Floyd, the Petitioner's counsel of choice. The Fourth Circuit noted at page six of its decision that " . . . Ingram had signed all of the pleadings for Wallace and argued all of the motions, including his various motions for a continuance. It follows that the district court judge had every reason to believe that Ingram was sufficiently experienced in the case and that he was

perfectly qualified to represent Wallace at trial." (Opinion, p.6)

Mr. Ingram's competence or incompetence, and the resulting prejudice or lack of prejudice to the Petitioner, is simply irrelevant in this context. The decision of the Fourth Circuit failed to directly address this issue, and, therefore, this petition should be granted on that basis alone.

The Petitioner also cited to the Fourth Circuit Court of Appeals the case of United States v. Rankin, 779 F.2d 956 (3rd Cir. 1986) in which the Third Circuit recognized the difficulty presented by the existence of conflicting demands for the service of particular counsel by different courts. The Court in the Rankin case stated as follows:

> Here, we have no belated request, no bad faith, no

> maneuvers intended to delay. Rather, we are confronted with the serious, frustrating, and recurring problem of allocating busy trial counsel's time among busy and overburdened courts in the state and federal systems. Because lawyers are not "fungible", . . . some accommodation must be reached.

United States v. Rankin, 779 F.2d at 959.

The decision of the Fourth Circuit stated that the Petitioner's factual situation was "clearly distinguishable" from the Rankin case, because, in that case, the trial judge substituted an undesired court-appointed attorney for the defendant's counsel of choice, whereas, in this case, the defendant was represented at trial by Mr. Ingram, who was not appointed by the court when Mr. Floyd became unavailable.

The fact that Mr. Ingram and Mr. Floyd were members of the same law firm,

and that Mr. Ingram was not appointed to represent the Petitioner at trial, are not dispositive facts on the issue of whether this Petitioner was denied his constitutional right to his counsel of choice. The Petitioner directs the Court's attention to United States v. Johnston, 318 F.2d 288 (6th Cir. 1963), which found a violation of the defendant's right to counsel of choice where the defendant was forced to proceed to trial with an associate of his chosen counsel. That Court found a constitutional violation in spite of the fact that the associate had participated fully in the case up to that point and was well qualified to try the case alone. United States v. Johnston, 318 F.2d at 291.

In the case of the Petitioner, there was no belated request, no bad faith, no maneuvers intended to delay. Rather, the Petitioner found himself, on extremely short notice, faced with the unexpected demand by the trial judge that he proceed to trial despite the fact that his counsel of choice was involved in a state court trial. The fact which truly distinguishes this case from the Rankin case, 779 F.2d at 959, and which makes this case an even more compelling one for reversal, is the fact that this Petitioner's counsel of choice had a state court conflict solely because he had been led to believe one week earlier by the trial judge that this trial would not proceed during this week. In effect, the trial judge contributed to the

creation of, if he did not, in fact, alone create the conflict.

The decision of the Fourth Circuit also quotes the trial judge when he stated that Ingram "never mentioned any problem with Mr. Floyd or that he had to be here for the case." (Opinion, p. 5) In the first place, to the contrary, Mr. Ingram had taken every opportunity to inform the Court that Mr. Floyd was lead counsel and intended to represent the Petitioner, including the perfunctory pretrial appearances by Ingram with the defendant to set conditions for pretrial release and for arraignment, which together took a total of less than fifteen minutes.

Second, and more importantly, there was no reason for Mr. Ingram or Mr. Floyd to inform the Court of Mr. Floyd's state

court trial conflict prior to February 17, 1993, because, as far as they knew, there was no conflict until that time. Mr. Floyd only began his state court trial after it became unequivocally clear at the February 9 hearing that this Petitioner's trial would not proceed during the week of February 15, 1993. Mr. Floyd only began his state court trial on February 15, 1993, after the full assurance by this trial judge during the hearing on February 9, that this Petitioner's trial would not proceed until the last week of February or sometime in March of 1993. The trial judge, having largely contributed to Mr. Floyd's conflict, or more accurately having created Mr. Floyd's conflict, then proceeded to deny the Petitioner his constitutional right to his counsel of

choice, Mr. Floyd, by forcing the Petitioner to trial with Mr. Ingram as his counsel because of that conflict.

As noted above, the fact that Mr. Ingram previously had appeared with the Petitioner at pretrial court appearances and may have been competent to try the case is not dispositive on the issue of the denial of a constitutionally mandated right. Although some appellate cases list prejudice to the defendant in a laundry list of factors to be considered by a judge in ruling on a motion to continue, see, e.g., United States v. Lussier, 929 F.2d 25, 28 (1st Cir. 1991); United States v. Burton, 584 F.2d 485, 490-491 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979), the cases cited by the Petitioner hold that prejudice to a defendant is presumed from the denial of

counsel of choice. Bland v. California Department of Corrections, 20 F.3d 1469 (9th Cir. 1994); United States v. Rankin, 779 F.2d 956 (3rd Cir. 1986); United States v. Harvey, 814 F.2d 905 (4th Cir. 1987); Wilson v. Mintzes, 761 F.2d 275 (6th Cir. 1985).

In so holding, the Sixth Circuit in the Wilson case compared the situation of a defendant who was denied his right to counsel of choice with the situation of a defendant who claimed he did not receive effective assistance of counsel, both cognizable claims under the Sixth Amendment. That Court noted that, in raising a claim of ineffective assistance of counsel, a defendant must demonstrate that some prejudice flowed from that alleged ineffective assistance of counsel under the analysis of Strickland v.

Washington, 466 U.S. 668 (1984). The Court stated that prejudice must be shown by a defendant in that situation because ineffective assistance of counsel claims involve the fundamental fairness of a trial, and are concerned with the reliability or objective fairness of the trial. Wilson v. Mintzes, 761 F.2d at 283.

However, the Court stated that, unlike a claim of ineffective assistance of counsel, the right to counsel of choice "'reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding.'" Id., at 283, quoting Flanagan v. United States, 465 U.S. 259, 268 (1984). The Court therefore held that prejudice need not be demonstrated when a defendant is denied

the right to counsel of his choice. The Court noted that to require a defendant to establish that he was prejudiced by a denial of his right to counsel of choice would focus the attention of the appellate court on the result obtained, rather than on the defendant's constitutional right to exercise that choice. Id., at 286.

The Petitioner again points to the especially cogent comments of the Third Circuit Court of Appeals when it stated as follows:

> [a]ttorneys are not fungible . . . [and] may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues. These differences, all within the range of effective and competent advocacy, may be important in the development of a defense . . . . Given this reality, a defendant's decision to select a particular attorney becomes critical to the type of

> defense he will make and thus falls within the ambit of the Sixth Amendment.

United States v. Romano, 849 F.2d 812, 819 (3rd Cir. 1988).

This Petitioner diligently exercised his opportunity to retain counsel of his choice. His request for a continuance to allow his counsel to be present was not an attempt to delay his trial for some ulterior motive. To the contrary, the Court itself had given the defendant and his counsel of choice the unmistakable impression, one week earlier, that his trial would not be called during the week in which in fact, it was called on one-half day's notice. The insistence by the trial judge that this defendant proceed to trial without his counsel of choice without stating on the record any justifiable reason was " . . . a myopic

insistence upon expeditiousness in the face of a justifiable request for delay . . . ", rendering the right of this defendant to his counsel of choice an empty formality. Ungar v. Sarafite, 376 U.S. 575, 589 (1964).

CONCLUSION

Based upon the facts and the arguments presented, the Petitioner is entitled to a new trial in which he may be assisted by his counsel of choice as guaranteed to him by the Sixth Amendment to the United States Constitution. Therefore, it is respectfully requested by the Petitioner that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit for the purpose of allowing review of this cause.

This the 9th day of November, 1994.

Jack W. Floyd by WCI

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NO.

IN THE

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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	)No.93-5760
GARY LYNN WALLACE, Defendant-Appellant.	)

Appeal from the United States District Court for the Middle District of North Carolina, at Durham.
Frank W. Bullock, Jr., Chief District Judge.

(CR-92-278-D)

Argued: May 11, 1994

Decided: June 23, 1994

Before ERVIN, Chief Judge, WILKINSON, Circuit Judge, and ELLIS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Jack William Floyd, William Carlton Ingram, Jr., FLOYD, ALLEN & JACOBS, Greensboro, North Carolina, for Appellant. Harry L. Hobgood, Assistant United States Attorney, Greensboro, North Carolina, for Appellee. **ON BRIEF:** Benjamin H. White, Jr., United States Attorney, Greensboro, North Carolina, for Appellee.

OPINION

PER CURIAM:

Appellant Gary Lynn Wallace ("Wallace") was charged in an eight count indictment with conspiracy to misapply bank funds and with the substantive counts of misapplication, or aiding and abetting in the misapplication, of bank funds in violation of 18 U.S.C. §§ 371 and 656, respectively. Wallace was tried on February 18, 1992 and convicted on all counts. He was represented at trial by one of two attorneys retained by him prior to his indictment. His other

attorney was involved in a state court proceeding that day and could not be present.

Wallace brings this appeal, claiming that the district court's refusal to grant him a continuance in order for his second attorney to be present at his trial resulted in the violation of his Sixth Amendment right to counsel of his choice. Because we find that the district court did not abuse its discretion in refusing to grant Wallace the continuance, we affirm his conviction.

I.

Wallace, a real estate developer in Durham, North Carolina, was indicted on November 30, 1992 and charged in count one with violation 18 U.S.C. § 371 by

conspiring with codefendant, Thurman Edward Dortch, to misapply funds of NationsBank in violation of 18 U.S.C. § 656. Wallace and Dortch were also charged in counts two through seven with violating 18 U.S.C. § 656 by making separate fraudulent loans and converting the proceeds to Wallace's use and benefit.

Earlier in 1992, when an FBI agent and bank officials first approached Wallace concerning the charges in this case, Wallace retained Jack Floyd ("Floyd") to represent him in the matter. In his appellate brief, Wallace maintains that Floyd requested that one of his partners, William Ingram ("Ingram") to assist him, but that "[f]rom the outset it was the intention of [Wallace], and the understanding of Mr. Floyd and Mr.

Ingram, that Mr. Floyd would serve as primary lead counsel throughout the trial of this criminal case, to be assisted by Mr. Ingram."

On December 2, 1992 Wallace appeared in district court with Ingram for the setting of his conditions of pretrial release. On December 7, 1992 Wallace appeared with Ingram for arraignment. At the arraignment, Wallace's trial tentatively was scheduled for January 11, 1993. On December 17, 1992 Wallace moved to continue his trial, claiming that his lawyers, Ingram and Floyd, were already committed to try a case in Guilford County district court on January 25, 1993 and would be unavailable for the January criminal term in federal court. The district court granted Wallace's motion

on January 15, 1993 and Wallace's trial was continued until February 8, 1993.

On February 3, 1993 Wallace filed a second motion to continue his trial until after February 16, 1993 because of trial conflicts of counsel and the need for additional preparation time. In its opposition to Wallace's second request for a continuance, the government stated that due to a problem with interlocking confessions and also by the nature of the alleged conspiracy, it would prefer that Dortch be tried alone on February 16, 1993 and that Wallace be tried later during the February term.

On February 9, 1993 the district court conducted a hearing on the motion to continue and other pending motions. Ingram, appearing on behalf of Wallace, advised the court that a continuance

would be unnecessary if Wallace were to be tried after March 1. The district court pointed out that it already had a multi-defendant trial scheduled for March 1 that would last a week and another matter that would occupy the week of March 15. The district court stated:

> This initial appearance was in early December. The case has been continued from the January term, and I am not likely to continue it again....I am not going to continue the case simply because they don't have time to comply.
>
> . . .
>
> What I way [sic] saying to you and said at the outset, I am not going to continue the case for another judge, and I am not going to continue it beyond the 16th of February if that means that the Court will not be able to dispose of some other criminal case on the 16th of February. I don't care if it is Mr. Dortch's case on the 16th of February, or whether it's one of these other cases that I have not set, assuming the U.S. Attorney's conflicts and other scheduling matters

> don't result in any delay of the other cases on the February calendar.

The government advised Ingram shortly after the February 9, 1993 hearing that in the event Dortch's trial did not go forward on February 16th, Wallace would be tried on that date instead.

Indeed, Dortch's trial did not begin on February 16, and on February 17, Ingram received a telephone call from the Clerk indicating that Wallace should be in court at 2:00 p.m. that day for jury selection. That afternoon, a discussion took place off the record concerning the order of the trials of Dortch and Wallace, during which Ingram informed the court that Floyd had a trial conflict and would be unavailable until at least February 22, 1993. Despite Floyd's unavailability, the district court

ordered Ingram to appear for jury selection that afternoon, with Wallace's trial to begin the following morning.

On the morning of February 18th, the district court judge made the following statement for the record:

> I'm going to point out on the record, too, that this case had been set for the week of the 8th, that you [Ingram] had appeared and signed all of the pleadings in this case, appeared for all of the motions, and on February 3rd, you filed a motion for continuance of trial based on your conflicts and your other obligations in this court, to continue the matter beyond February 16th, not to call it before February 16th. And the case was not called before February 16; it was called on February the 17th. So you and Mr. Floyd are asking us to set something that suits not only his schedule, but your schedule, and both of your schedules together. And the motion is denied, I think for ample reason.

Furthermore, the court noted that Ingram "never mentioned any problem with Mr. Floyd or that he had to be here for the case." In response to Ingram's objections to beginning without Floyd, the court stated:

> Well, I hope he will join us sometime, whenever he can, but I am sure you are fully capable of representing Mr. Wallace.

The trial concluded on February 23, 1993 with the jury returning verdicts of guilty on each of the seven counts against Wallace. Wallace appeared for sentencing on July 26, 1993 and received a term of imprisonment of 53 months (concurrent on all counts), restitution in the amount of $1.7 million dollars jointly and severally with codefendant Dortch, and a special assessment of $50.00 for each of the seven counts on which he was convicted. A judgment

incorporating that sentence was filed on September 14, 1993 and an amended judgment was filed on September 27, 1993.

Wallace filed a timely notice of appeal on September 15, 1993 and reported for service of his 53-month term of imprisonment on November 1, 1993, which term he is currently serving at the federal prison camp at Butner, North Carolina.

II.

The Sixth Amendment guarantees a defendant a fair opportunity to secure counsel of his own choice to represent him at trial on criminal matters. Powell v. Alabama, 287 U.S. 45, 53 (1932). In recognition of the importance of a defendant's relationship with his attorney, appellate courts have found

constitutional violations when a trial court has denied a continuance that was sought so that an attorney retained by the defendant could represent him at trial.[1] However, the right to counsel

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[1] In Releford v. United States, 288 F.2d 298 (9th Cir. 1961), the attorney retained by the defendant was hospitalized. Instead of granting a continuance so that either the retained attorney could represent the defendant at trial or the defendant could secure counsel of his own choice, the trial judge ordered another attorney to represent the defendant over the defendant's objection. Id. at 299-301. The Ninth Circuit reversed the defendant's conviction because the defendant had been deprived of the assistance of counsel of his own choice.

Similarly, in Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978), the Fifth Circuit found that the defendant had been denied due process when the state trial court denied a continuance and forced the defendant to go to trial with an attorney other than the one he had retained. In the court's view, "the trial was rendered fundamentally unfair when [the defendant] was effectively denied his right to choose his own counsel." Id. at 1327. See also Linton v. Perini, 656 F.2d 207, 209-11 (6th Cir. 1981); United States v.

of choice is not absolute. Gandy, at 1323. "[T]he right...is only a qualified one, the opportunity guaranteed is only a 'fair' one." Sampley v. Attorney General of North Carolina, 786 F.2d 610, 612-13 (4th Cir. 1986), cert. denied, 478 U.S. 1008 (1986).

Wallace places particular reliance on the case of United States v. Rankin, 779 F.2d 956 (3d Cr. 1986), to support his Sixth Amendment claim. In Rankin, the defendant's counsel of choice was unavailable for trial because of his involvement in state court trial proceedings. The court denied the defendant's request for a continuance and instead appointed counsel to represent the defendant one month before his trial.

Seale, 461 F.2d 345, 356-61 (7th Cir. 1972).

Finding that "interfering with a defendant's efforts to secure counsel and thereby forcing on him representation by an undesired court-appointed attorney may amount to a denial of a constitutional right, "the Third Circuit reversed the defendant's conviction. Id. at 958.

The case at hand, however, is clearly distinguishable from Rankin, where the defendant's chosen counsel was replaced with an undesired court appointed counsel. In the instant case, Ingram and Floyd were both attorneys of record for Wallace. Moreover, Ingram had signed all of the pleadings for Wallace and argued all of the motions, including his various motions for a continuance. It follows that the district court judge had every reason to believe that Ingram was sufficiently experienced in the case

and that he was perfectly qualified to represent Wallace at trial.

As this court recognized in Sampley,

> [o]bviously a defendant has no constitutional right to dictate the time, if ever, at which he is willing to be tried by simply showing up without counsel, or with allegedly unsatisfactory counsel, whenever his case is called for trial, see Ungar v. Sarafite, 376 U.S. 575 (1964), or by objecting that counsel then retained or assigned is not presently "counsel of his choice," see Morris v. Slappy, 461 U.S. 1 (1983). The limit of the right is necessarily found in the countervailing state interest against which the sixth amendment right provides explicit protection: the interest in proceeding with prosecutions in an orderly and expeditious basis, taking into account the practical difficulties of "assembling the witnesses, lawyers, and jurors at the same place at the same time," Morris v. Slappy, 461 U.S. at 11.

786 F.2d at 613 (emphasis added).

Clearly, Wallace had no constitutionally protected right to have his case continued solely on the basis of his objection that Ingram, one of his two counsel of record, was not presently "counsel of his choice."

Furthermore, in determining if a continuance should be granted, a court should consider the efficient administration of justice; the accused's rights, including an adequate opportunity to prepare a defense; and the rights of other defendants awaiting trial who may be prejudiced by a continuance. United States v. Kikumura, 947 F.2d 72, 78 (3d Cir. 1991). "Thus a court, considering all of the facts of a particular case, may refuse to grant continuance even if to do so results in the deprivation of defendant's chosen counsel." Id. The

record shows that Wallace was given notice that he would be tried as early as January 15, 1993 when his first continuance was granted, and that he was advised after February 9, 1993 that his case would be called on February 16 if Dortch's trial did not commence on that date. He had already been granted one continuance on the basis of scheduling conflicts.[2] Given these facts, and

[2] Wallace also cites to the Guidelines for Resolving Scheduling Conflicts, which have been adopted by the North Carolina federal district courts and by the Fourth Circuit, in support of his contention that the district court should have contacted the state court judge to resolve Floyd's scheduling conflict. While doing so may wisely have avoided the conflict at issue in this case. Wallace fails to cite to the first paragraph of the Guidelines, which states that

> [i]t shall be the duty of counsel, other than sole practitioners, to have another member of the firm reasonably well acquainted with the case

balancing the district court's interest in managing its own calendar so as not to prejudice the rights of other defendants whose trials might be delayed by the granting of unnecessary continuances, we conclude that the district court did not abuse its discretion in refusing to grant Wallace a second continuance, and we affirm Wallace's conviction.

AFFIRMED

> to the end that, where practicable, substitution of counsel may be made in order to avoid conflict.

Clearly, the district court had ample reason to find that Ingram was capable of trying Wallace's case given the record of Ingram's involvement in the case up until the trial.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 19, 1994

No. 93-5760
CR-92-278-D

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

GARY LYNN WALLACE

Defendant-Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK